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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5072

SHIRLEY DAVIS,

Petitioner,

v.

OTTO E. PASSMAN,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, en banc, reported at 571 F.2d 793, appears at Appendix 44-95. The opinion of the panel of the Court of Appeals, reported at 544 F.2d 865, appears at Appendix 11-40. The opinion of the United States District Court for the Western District of Louisiana, which is not reported, appears at Appendix 9-10.

JURISDICTION

A divided panel of the United States Court of Appeals for the Fifth Circuit reversed a judgment of the district court on January 3, 1977. Timely petitions for rehearing and rehearing en banc were granted by order dated May 17, 1977, which appears at Appendix 43. The judgment of the court of appeals on rehearing en banc was entered April 18, 1978, and appears at Appendix 96-97. This Court has jurisdiction under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a cause of action for money damages based upon a claim of employment discrimination against members of Congress may be implied directly from the Fifth Amendment to the United States Constitution under the rationale of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971).

2. Whether the Speech or Debate Clause of the United States Constitution bars an action for money damages against a federal congressman predicated upon a claim of sex discrimination in the discharge of a personal staff member.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

Article 1, §6 of the Constitution of the United States provides in pertinent part:

> ". . . for any speech or debate in either House, they [the Senators and Representatives] shall not be questioned in any other place."

Section 7151 of Title 5 of the United States Code provides:

> "It is the policy of the United States to insure equal employment opportunities for employees without discrimination because of race, color, religion, sex, or national origin."

Section 717 of Title VII of the Civil Rights Act of 1964, Section 2000e-16(a) of Title 42 of the United States Code, provides in pertinent part:

> "All personnel actions affecting employees . . . in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service . . . shall be free from any discrimination based on race, color, religion, sex, or national origin."

Section 92 of Title 2 of the United States Code provides in pertinent part:

> ". . . such persons shall be subject to removal at anytime by such member (of the House of Representatives) . . . with or without cause."

STATEMENT OF THE CASE

Plaintiff Shirley Davis was employed by defendant Otto E. Passman, United States Congressman from the Fifth Congressional District of Louisiana, as his Deputy Administrative Assistant from February 1, 1974 through July 31, 1974. During her tenure, plaintiff considered herself to

be the understudy to Congressman Passman's administrative assistant and expected a promotion to that position upon the imminent retirement of the administrative assistant. Appendix 4. Congressman Passman terminated the employment of Mrs. Davis stating in his June 21, 1974 letter of dismissal:

> "You are able, energetic and a very hard worker. Certainly you command the respect of those with whom you work; however, on account of the unusually heavy work load in my Washington Office, and the diversity of the job, I concluded that it was essential that the understudy to my Administrative Assistant be a man." Appendix 6.[1]

Plaintiff filed this action in the United States District Court for the Western District of Louisiana on August 7, 1974, alleging that defendant's conduct constituted sex discrimination in violation of the equal protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution. Plaintiff requested money damages, including back pay, as well as various forms of specific relief that are not involved in this case because Congressman Passman is no longer in office, his tenure ending January 3, 1977.

Defendant moved to dismiss the action under Rule 12(b)(6) of the Federal Rules of Civil Procedure, contending (1) the discharge of plaintiff did not violate the Fifth Amendment; (2) plaintiff has no private right of action; and (3) the suit is barred by the doctrines of sovereign and official immunity. On February 26, 1975, the district court granted the motion, ruling in defendant's favor on the first two issues, but also holding that the immunity doctrines would not bar plaintiff's suit. (Appendix 9-10)

[1]Congressman Passman is prepared to demonstrate at trial that the discharge was for nondiscriminatory reasons, if such need arises.

On appeal, a panel of the United States Court of Appeals for the Fifth Circuit, in a 2-1 decision, reversed and remanded. 544 F.2d 865 (Appendix 11-40). The majority held (1) dismissal of staff by a member of Congress on the basis of sex violates the equal protection component of the Fifth Amendment Due Process Clause (Appendix 13-19); (2) plaintiff has a private right of action for damages arising directly under the Fifth Amendment (Appendix 21-29); (3) sovereign immunity is no bar to a damage award against a congressman as an individual (Appendix 29-31); (4) legislative immunity, granted by the Speech or Debate Clause of the United States Constitution, Art. I, §6, does not extend to staff dismissals since that conduct is not within the "sphere of legitimate legislative activity" (Appendix 31-38); and (5) a congressman enjoys no absolute immunity outside that afforded by the Speech or Debate Clause (Appendix 38-40). The dissenting judge, Jones, concluded that the doctrine of separation of powers required affirmance of the district court's action (Appendix 40).

After rehearing the case en banc, the Court of Appeals reversed the panel in a 12-2 decision, and affirmed in part and vacated in part the judgment of the District Court. 571 F.2d 793 (Appendix 96-97). Considering only the issue of whether plaintiff had an implied cause of action for money damages arising directly under the Fifth Amendment, the majority held that the rationale of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) should not be extended to apply a money damages remedy from the Fifth Amendment against members of Congress. And in so holding the Court applied the factors set forth in *Cort v. Ash*, 422 U.S. 66, 77-85 (1975) to determine whether to imply the damage action and

also determined whether the Constitution itself compelled an action for money damages implied from the Fifth Amendment due process clause. (Appendix 55). In a concurring opinion, Judge Jones again related that considerations of separation of powers and Speech or Debate Clause immunity should apply. Judge Roney also concurred separately and asserted that the extension of the *Bivens* rationale depended on the nature of the personal right involved and that Constitutional causes of action should be predicated upon preconstitutional notions of tort law (Appendix 59-66).

Judge Goldberg and Chief Judge Brown dissented and urged that the Constitution mandated that *some* remedy be available to vindicate constitutional rights. Judge Goldberg disagreed with the majority's application of the *Cort* criteria and felt that those criteria would imply a cause of action for money damages in this case. (Appendix 83).

SUMMARY OF ARGUMENT

Plaintiff seeks under *Bivens* rationale to imply a cause of action for money damages against a former Congressman for alleged sex discrimination in her discharge from his personal staff. A *Bivens* cause of action for damages by federal officials or employees should not be extended beyond its Fourth Amendment factual context involving physical intrusions in search and seizure and arrest situations or beyond factual contexts involving preconstitutional notions of tort law. "Special factors counselling hesitation" in the expansion of the *Bivens* rationale exist in this case. To expand the *Bivens* rationale to encompass possible Fifth Amendment due process infringements will create an unmanageable flood of new cases and will discourage vigorous federal action. Congress' intent is that employees on the personal staff of members of Congress who are excluded from coverage of the Civil Rights Act of 1964 have no judicial remedy. The doctrine of separation of powers requires that the judiciary refrain from scrutinizing Congressional personnel actions as does the Speech or Debate Clause of the Constitution. The foregoing special factors militate against expansion of the *Bivens* rationale to provide a cause of action for money damages to personal staff employees of members of Congress for alleged employment discrimination.

An absolute bar to this action is the Speech or Debate Clause of the Constitution which provides immunity to members of Congress from scrutiny by the judiciary of the members' legislative activities. The functions of the staff of a member of Congress are such an integral part of, and necessary to, the member's performance of the legislative function that the discharge of personal staff members must be considered to be within the sphere of legitimate legislative activity. Personal staff employees are so involved in the legislative function that they have been found to share the Speech or Debate immunity of members of Congress. Under the application of the Speech or Debate immunity, Congressman Passman's motives are not subject to question and any right of action based upon the discharge of a member of his legislative staff is completely barred.

I.

A CAUSE OF ACTION FOR MONEY DAMAGES BASED UPON A CLAIM OF EMPLOYMENT DISCRIMINATION AGAINST MEMBERS OF CONGRESS SHOULD NOT BE IMPLIED DIRECTLY FROM THE FIFTH AMENDMENT UNDER THE RATIONALE OF *BIVENS V. SIX UNKNOWN NAMED AGENTS OF THE FEDERAL BUREAU OF NARCOTICS*, 403 U.S. 388 (1971).

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,*[2] this Court held that a violation by federal narcotics agents of an individual's Fourth Amendment right ". . . to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures. . ." gave rise to a cause of action for damages. The Court noted that ". . . the Fourth Amendment does not in so many words provide for its enforcement by an award of money damages for the consequences of its violation" and stated further that "it is settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done". Id. at 396, quoting *Bell v. Hood,* 327 U.S. 678, at 684, 90 L.Ed. 939, at 944.

Importantly, the Court then related that "The present case involves no special factors counselling hesitation in the absence of affirmative action by Congress." *Bivens, supra* at 396. In response to the government's position that the question involved was whether money damages were neces-

[2]403 U.S. 388, 29 L.Ed.2d 619, 91 S. Ct. 1999 (1971).

sary to enforce the Fourth Amendment, the Court stated "For we have no explicit Congressional declaration that persons injured by a federal official's violation of the Fourth Amendment may not recover money damages from the agents but must instead be remitted to another remedy, equally effective in view of Congress." *Bivens, supra,* at 397. In his concurring opinion, Justice Harlan noted that ". . . the appropriateness of money damages may well vary with the nature of the personal interest asserted." *Bivens,* supra at 409, n.9 Chief Justice Burger, Justice Black, and Justice Blackmun dissented. Chief Justice Burger dissented on the basis that the doctrine of separation of powers required that a judicial remedy should not be created where not enacted by Congress nor provided for by the Constitution. *Bivens, supra* at 411, 412. Justice Black based his dissent upon the fact that as Congress had created no damage remedy for improper Fourth Amendment intrusions by federal officials, it was beyond the power of the Court to create a remedy. Justice Blackmun dissented on the basis of the majority opinion in the Court below[3] and on the bases that ". . . the judicial legislation, which the Court in its opinion today concededly is effectuating, opens the door for another avalanche of new federal cases," and that proper law enforcement would be stultified by the threat of suit.

Quite obviously, *Bivens* did not involve a former member of Congress, a discharged deputy administrative assistant, any allegation of sex discrimination[4] or an appeal to the Fifth Amendment to the Constitution. Unlike *Bivens,* the instant

[3]That opinion is based partially upon the view that "We do not believe it is appropriate for this Court to fill the hiatus left in this area by Congress." *Bivens,* 409 F.2d 718 at 725 (1969).

[4]Defendant does not contend herein that discrimination based upon a classification of sex is not protected by the Fifth Amendment.

case involves all of these unique factors and it is submitted that the decision below was correct in its refusal to imply a *Bivens* cause of action for money damages under the Fifth Amendment for alleged sex discrimination in employment by a former Congressman.

A. A Bivens Cause of Action Should Be Limited To Physical Intrusions By Federal Officers or Employees.

The *Bivens* Court noted that "an agent acting - albeit unconstitutionally - in the name of the United States possesses a far greater capacity for harm than an individual trespassor exercising no authority other than his own." *Bivens, supra,* at 392. And clearly, the exercise of the police powers of the state against individual citizens gives rise to physical damages to one's person and property and to the risk of incarceration all in the name of government. And further, the eminent domain power of government may entail the physical taking of an individual's property in the name of government.[5] These are potentially physical harms which may result from the abuse of government power and the resulting harm will be even greater because they occur under color of law. A *Bivens* cause of action clearly is a useful means of providing a check upon such abuses unique to the functions of government.

However, an individual act of alleged employment discrimination by a government official and particularly

[5]*Jacobsen v. Tahoe Regional Planning Agency,* 558 F.2d 928 (9th Cir. 1977), cert. granted sub nom; *Lake County Estate, Inc. v. Tahoe Regional Planning Agency,* ___ U.S. ___, 98 S.Ct. 2843, 56 L.Ed.2d 784 (1978).

members of Congress cannot be characterized as an act which may "possess a far greater capacity for harm" than a similar act by a private citizen. Individuals are hired and fired every day and the impact is the same regardless of whether the employer was governmental or private. There is nothing inherent in government which makes an employment decision by a government official to discharge an individual have any greater effect on the discharge merely because the employer was the government.[6] To the extent that the capacity of an act for greater harm because it was a governmental act and because it was an exercise of police powers was a factor in the *Bivens* decision, that factor does not exist in an alleged discrimination case.

It is thus urged that a *Bivens* cause of action be limited to a factual situation similar to that found in *Bivens* itself where the wrong is clearly a physical intrusion and the capacity for harm is amplified because the act was a government act.

[6]Had petitioner been employed outside the federal government in the private sector there is a substantial probability that she would have had no remedy for a discharge alleged to have been motivated by sex discrimination. Section 701(b), Title VII of the Civil Rights Act of 1964, as amended, defines as "employer" in the private sector as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. . ." 42 U.S.C. §2000e(b). Thus, a substantial number of small employers have no obligation whatsoever under Title VII not to discriminate on the basis of sex against their employees. Further, because the Civil Rights Act of 1866, 42 U.S.C. §1981, does not prohibit sex discrimination, as stated in *Runyon v. McCrary,* 427 U.S. 160 at 167, 49 L.Ed. 415, 96 S. Ct. 2586 (1976), an individual who has been the victim of sex discrimination in employment in the private sector has no legal relief for such discrimination unless the employer involved is large enough to be covered by the obligations of Title VII.

B. A Bivens Cause of Action Should Be Limited to "Preconstitutional Notions of Tort Law".

This is the reasoning advanced by Judge Roney in his concurring opinion in the decision below and is an alternative approach toward a proper limitation upon a *Bivens* cause of action. Appendix 59-66. It is clear that employment discrimination on the basis of sex or any other basis was not in the minds of those who drafted the Bill of Rights. In *Adair v. United States,* 208 U.S. 161, 20 S. Ct. 277, 52 L.Ed. 436 (1907) the Court stated:

> "So the right of the employee to quit the service of the employer, for whatever reason is the same as the right of the employer for whatever reason, to dispense with the services of such employee" Id. at 174, 175.

As Judge Roney noted, this was the state of the law into this century and was the law at the time of the drafting of the Constitution. The Petitioner herein thus had a right at the time of the drafting of the Constitution to be protected against unreasonable searches and seizures, but had no right at all to be free of discrimination in employment. The concept of sex discrimination in employment as a remediable wrong first became national law with passage of the Civil Rights Act of 1964, long after the drafting of the Constitution in 1787.

The limitation of a *Bivens* cause of action to preconstitutional torts which were clearly embodied in the Constitution by the framers is a much more feasible approach than subjecting federal officers to damage actions for every conceivable wrong that arises out of the Fifth Amendment's constantly expanding due process conceptions.

C. Bivens Recognized That Special Factors Counselling Hesitation May Exist.

In *Bivens,* the Court considered whether special factors existed which warranted hesitation in the creation of an action for money damages based upon the Fourth Amendment. The present case involves a multitude of special factors not present in *Bivens* which warrant the refusal to imply a cause of action for money damages based upon the Fifth Amendment.[7]

1. Expansion of a Bivens Cause of Action Beyond Physical Intrusions or Preconstitutional Torts to Include the Fifth Amendment Will Create An Unmanageable Flood of New Cases.

Bivens was based upon a rather limited fact situation involving the abuse of federal police powers in a search and

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[7]Whether the implication of a damage action is considered from the standpoint of the criteria set forth in *Cort v. Ash,* 422 U.S. 466, (45 L.Ed.2d 26, 95 S. Ct. 2080) (1975) or from the "special factors" approach of *Bivens,* the relevant criteria were properly evaluated in the en banc decision below and that decision should be affirmed. The Fifth Circuit's *Cort* analysis is sound and is well expressed in the opinion below; the argument which follows herein is presented to emphasize the correctness of that decision. The Fifth Circuit recognized that *Cort* factors are not applied the same way in *Bivens* actions (Appendix 50) and this is particularly true when a coordinate branch of government is involved.". . . the use of the Constitution as the source of a plaintiff's right (in *Bivens*) was only a minute departure from the traditional and more usual use of federal legislation as the source of a plaintiff's right. The Court in *Bivens,* and other federal courts subsequently relying in *Bivens,* recognize constitutional torts in the same way and apply the same criteria that the federal courts have used for decades in recognizing torts from federal legislation." Note, *Remedies for Constitutional Torts: "Special Factors Counselling Hesitation,"* 9 Ind. L.Rev. 441, 444 (1976) (footnotes omitted).

seizure and arrest context in contravention of Fourth Amendment guarantees. Even without a definitive statement by this Court concerning the expansion of the *Bivens* rationale beyond the Fourth Amendment, every court of appeals has addressed the expansion question in the intervening six and one half years since *Bivens* was decided on June 21, 1971.[8] It would thus appear that the gates below have been opened and that unless this Court closes them, the flood will begin. The en banc decision below stated that:

> "Adoption of Davis' interpretation of *Bivens* would project the penumbra of federal court constitutional due process jurisdiction over every legally cognizable tortious injury inflicted by persons acting under color of federal law because, by its nature, every tort deprives the victim of due process through unlawful appropriation of liberty or property or both. Indeed, logically, the expansive effect of such a holding would not end there. It also would extend federal jurisdiction to cover all state action tort claims, either under pendent jurisdiction *c.f. Hagans v. Lavine*, 415 U.S. 528, 94 S. Ct. 1372, 39 L.Ed.2d 577 (1974), or under a cause of action implied from the fourteenth amendment. The latter of these state action claims would be cognizable without regard to diversity of citizenship, amount in controversy or other present statutory limitations. Because of the breadth of due process, a decision implying and action for money damages from the fifth amendment Due Process Clause alone would extend an action

[8]See the numerous cases listed at Appendix 46, 47, 70, 71; Petitioner's Brief 20-24; and in Lehmann, *"Bivens and Its Progeny"*, 4 Hastings Const. L. Q. 531, 566-568 nn. 226-229 (1977), including district court cases. Only the Fifth Circuit has considered possible application of *Bivens* to the employment practices of Congress in the case presently before this Court.

> for damages to any constitutional guarantee. Thus, the danger of deluging federal courts with claims otherwise redressable in state courts or administrative proceedings looms far more ominously than in *Bivens*. 403 U.S. at 391 & n.4, 91 S. Ct. at 2002 & n.4, 29 L.Ed.2d at 623 & n.4."

It is quite significant that from 1961 to 1977 civil rights statute cases brought in the federal court system have multiplied from a paltry 296 to an incredible 13,113. See 1977 Annual Report of the Director of the Administrative Office of the United States Courts, Table 11, 1976 id. Table 17. At the time of this writing the 1978 Annual Report is not available but surely the figures will increase even further.

If causes of action can be implied under *Bivens* directly from the Fifth Amendment, virtually any act of every federal official or employee which may be conceivably adverse to any individual's sphere of interests will support a cause of action for money damages. If the number of cases brought under civil rights statutes already justifiably has become a proper matter of judicial concern,[9] the potentially unmanageable filings based upon alleged infringement of raw Fifth Amendment rights in our increasingly litigious society should be a substantial factor counselling hesitation in this case.

[9]See *Butz v. Economou*, ___ U.S. ___, 57 L.Ed. 895, at 929, 98 S. Ct. 2894.

2. Expansion of a Bivens Cause of Action to Include Alleged Fifth Amendment Infringements by Federal Officials or Employees Will Inhibit Federal Actions and Discourage Federal Employment.

The Fifth Amendment is so broad in its scope that virtually any federal employee or federal official's actions or decisions can be challenged in a suit for damages. The threat of frequent, harassing litigation and personal liability in damages for federal actions that can be easily couched in terms of a denial of due process will lessen vigorous administration of the policies and programs of the federal government by federal officers and employees. The time and expense of defending against a myriad number and species of constitutional claims possibly resulting in a personal judgment will certainly discourage federal action[10] and could even discourage federal employment. A member of Congress would become an employer and one can only hope that the members' personal finances are sufficiently adequate to withstand money judgments without risk of bankruptcy. The

[10]See separate opinion of Justice Rehnquist in *Butz v. Economou, supra,* 57 L.Ed.2d at 926, where it was stated concerning immunity of federal officials: "But if we allow a mere allegation of unconstitutionality, obviously unproven at the time made, to require a Cabinet-level official, charged with the enforcement of the responsibilities to which the complaint pertains, to lay aside his duties and defend such an action on the merits, the defense of official immunity will have been abolished in fact if not in form. The case with which a constitutional claim may be pleaded in a case such as this, where a violation of statutory or judicial limits on agency action may be readily converted by any legal neophyte into a claim of denial of procedural due process under the Fifth Amendment, will assure that. The fact that the claim fails when put to trial will not prevent the consumption of time, effort, and money on the part of the defendant official in defending his action on the merits."

placing of members of Congress in fear of large money judgments will inhibit the legislative function and will deprive the members' constituents of full and vigorous representation of their interests. If the member of Congress is financially broken by a money judgment, the member's constituents no doubt will lose the benefit of representation by the member they elected. It is submitted that the public interest can only suffer if such a condition were permitted to prevail. These considerations, too, are special factors counselling hesitation in the extension of the availability of a *Bivens* cause of action to the Fifth Amendment.

3. Congress Has Evinced Its Intent by Failing to Provide a Damages Remedy for Those in Petitioner's Position in the Noncompetitive Federal Service.

It was not until 1972 that fedeal employees in the competitive service were given a statutory right to sue for backpay under Title VII of the Civil Rights Act of 1964. In that year, Congress provided procedures in Title VII for resolution of claims of discrimination in employment of competitive federal service employees. Section 717, 42 U.S.C.A. §2000e - 16 (a) (1972). The new remedies in Section 717(a) extended to employees ". . . in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service. . ." Congress thus completely exempted employees such as Petitioner who were on the personal staff of Congressional representatives because those employees are not in the competitive service. They occupy a special status. The Court below noted that when Congress passed Section 717 it

believed no other effective remedy existed for federal employees:

> "Despite the series of executive and administrative directives on equal opportunity, Federal employees, unlike those in the private sector to whom Title VII is applicable, face legal obstacles in obtaining meaningful remedies. There is serious doubt that court relief is available to the aggrieved Federal employee. *Monetary restitution or backpay is not attainable.*" H.R. Rep. No. 92-238, 92nd Cong. 2d Sess. (1972). U.S. Code Cong. & Admin. News (1972), pp. 2137, 2160 (Emphasis supplied)

In H.R. 92-238 it was earlier noted that ". . . Congress itself has specifically provided that it is the policy of the United States to insure equal employment opportunity for Federal employees without discrimination because of race, color, religion, sex or national origin. . ." 5 U.S.C. §7151 (Supp. II 1965, 1966); U.S. Code & Admin. News, *supra*, p. 2157. So even with the statutory policy of 5 U.S.C. §7151 at p. 2157 noted, H.R. 92-238 later at p. 2160 reflects the understanding of Congress that even with the statutory policy on the books, no "monetary restitution or backpay" was available to Federal employees absent passage of Section 717 of Title VII.

Clearly, Congress had to understand that those Federal employees in the legislative and judicial branches who were exempted from the operation of Section 717 continued to have "no monetary restitution or back pay" available to them and thus, by their exclusion, intended that they should continue to have no "monetary restitution or back pay" available.[11] Indeed, in *Brown v. General Services*

[11]The implication of a damages remedy in this case would confer upon Congressional employees excluded from the Civil Rights Act of 1964 the right to recover from individual members of Congress, a right unavailable *(continued)*

Administration, 425 U.S. 820, 828, 48 L.Ed. 402, 409, 96 S. Ct. 1967 (1976) the Court stated "The legislative history thus leaves little doubt that Congress was persuaded that federal employees who were treated discriminatorily had no effective judicial remedy. And the case law suggests that the conclusion was entirely reasonable." Clearly, Congress intended that exempt non-competitive federal service employees in Congress such as Petitioner should continue to have no judicial remedy.

In its intention to leave legislative employees in the noncompetitive service without judicially imposed monetary relief or backpay, Congress was certainly cognizant of 2 U.S.C. §92 which provides that members of a congressional representative's staff are removable "at any time. . . with or without cause" and which is the only statutory pronouncement concerning congressional obligations in discharge cases.

The House of Representatives did not speak as a body about its members and employment discrimination until January 14, 1975, around 6 months after the July 31, 1974, termination of Petitioner Davis and subsequent to the filing of this lawsuit. When the House did speak, it did not pass a statute conferring jurisdiction upon the federal courts for its employment discrimination problems; rather, it passed an internal rule, clause 9 of Rule XLIII of the Rules of the House of Representatives[12] which states:

(footnote continued from preceding page)

to federal employees covered by the Civil Rights Act. Congress cannot have intended that its own members suffer individual liabilities for alleged employment discrimination when it excluded the members' staffs from coverage of Title VII; it intended they should have *no* liability.

[12]94th Congress Second Session, House Document 94-663; Constitution, Jefferson's Manual and Rules of the House of Representatives of the United States at 674.

> "9. A Member, officer, or employee of the House of Representatives shall not discharge or refuse to hire any individual, or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[13]

Surely, if the House had intended to provide a judicial remedy for its exempt employees it could have easily done so; it has provided none. And, indeed, an attempt to implement Clause 9 of Rule XLIII by establishing a House Fair Employment Relations Board, H. Res. 1380,[14] also took the form of a resolution and provided solely for internal and nonjudicial proceedings to resolve any employment discrimination problems.

It is submitted that the understanding and intent of Congress is that employees on legislative staffs are without a judicial remedy for claims of employment discrimination and that those employees shall remain without a remedy until Congress itself or each house separately, provides for a remedy. Congressional intent is relevant and should be considered in determining whether to provide a damages remedy for an alleged infringement of a Fifth Amendment right in this case because the Court would impose such a remedy on a coordinate branch of government and separation of powers considerations and Speech or Debate Clause

[13]The Senate has adopted a similar internal rule which adds age and state of physical handicap as protected characteristics.

[14]This resolution and the Senate's counterpart S. Res. 431 failed to pass before Congress adjourned in October, 1978. See Responses in Opposition to Petition for a Writ of Certiorari and the Replies of Petitioner.

guarantees are involved.[15] In this case, Congressional intent counsels hesitation in the expansion of *Bivens.*

4. The Doctrine of Separation of Powers Requires That the Judiciary Refrain From Creating a Right of Action for Damages in Staff Employees of Congressional Representatives.

Even without the existence of the Speech or Debate Clause, substantial considerations of the doctrine of separation of powers exist in this case. A Fifth Amendment suit for damages against members of Congress for employment discrimination will necessitate judicial involvement in the internal personnel processes a members of the legislative branch of government. Scrutiny of Congressional personnel actions will involve ". . . policy determinations of a kind clearly for nonjudicial discretion;" *Baker v. Carr,* 369 U.S. 186 at 217 (1962).[16] Equitable or damage remedies imposed on Congressional representataives by the judiciary would be an unwarranted interference in the legislative process and in the internal functions of a coordinate branch of gov-

[15]The Court in *Bivens* noted "For we have no . . . congressional declaration that persons injured . . . may not recover money damages from the agents," 403 U.S. at 397. Congressional intent is to be considered and the court below was correct in doing so in this case.

[16]While the judiciary has had considerable experience in employment discrimination suits, it is submitted that the issues attendant to employment discrimination suits against members would largely deal with the involved employee's unsatisfactory performance of duties related to the member's legislative functions. It would seem that the legislators are better equipped to make judgments about proper performance of legislative staff members because they obviously possess expertise and a special understanding of the legislative role.

ernment.[17] Frivilous or unsubstantiated lawsuits could be used to discredit Congressional representatives by political opponents at election time.[18] Federal judges would be faced with the task of examining the internal workings of the staffs which Congressmen and Congresswomen have assembled and with examining the motives of the legislators behind the full range of possible personnel actions. Judicial creation of remedies for noncompetitive legislative employees in their employment situations will set the stage for "across the board" class action suits alleging employment discrimination by congressional representatives or by Congress as a whole. It is conceivable that federal judges would dictate to federal legislators which individuals to hire, which individuals to reinstate after an alleged wrongful discharge, and which individuals should be promoted or receive wage increases.

It boils down to the fact that if the judiciary creates an employment discrimination cause of action in exempted noncompetitive service Congressional employees, the judiciary soon will be dictating to Congressmen and Congresswomen how their legislative responsibilities should be performed in the sense that it will dictate by whom they should be performed.

It is submitted that creation of a cause of action in this case would lead to judicial interference in the internal workings of

[17]Senator John Glenn, a sponsor of S. Res. 431, stated his understanding that for a body outside the Senate to make final decisions with respect to discrimination by the Senate would be a violation of the separation of powers doctrine of the Constitution. 134 Cong. Rec. S. 18228 (daily ed. October 12, 1978).

[18]This aspect has been of concern to members of Congress. See remarks of Senator Glenn in the Congressional Record S. 18228 (daily ed. October 11, 1978).

a coordinate branch of government such as to amount to "... a lack of respect due coordinate branches of government..." *Baker v. Carr, supra,* at 257. The creation of remedies for a legislator's alleged personnel deficiencies is an internal legislative matter which should be decided by Congress. See concurring opinion of Judge Jones in the decision below,[19] Appendix 57-60. Separation of powers concepts comprise clearly a special factor warranting hesitation in the extension of *Bivens* to a Fifth Amendment action against a member of Congress, as against other federal officers or employees.

5. Congressional Staff Members Play Such An Important Role in the Legislative Function That the Speech or Debate Clause of the Constitution Confers Immunity for a Congressional Representative's Personnel Actions.

The existence of the Speech or Debate Clause[20] itself is a special factor in this case warranting hesitation in the expansion of *Bivens.* Treated more fully, *infra,* it can operate as an absolute bar to this action and certainly must be considered as a special factor unique to this case. The work of the employees on the personal staffs of members of Congress is such an integral part of the legislative function that the members' decision to hire or fire one of those legislative staff members is itself a legislative act which,

[19]The general grant of legislative powers found in Article 1, Section 1 of the Constitution is also relied upon to further demonstrate the importance of the separation of powers doctrine in this case.

[20]Article 1, Section 6 of the Constitution, where it is written that "for any Speech or Debate in Either house, (the Senators and Representatives) shall not be questioned in any other place."

under the Speech or Debate Clause, is immune from judicial review.

In *Gravel v. United States,* 408 U.S. 606, at 617 (1972) the Court realized that "... the day-to-day work of such aides is so critical to the members' performance that they must be treated as the latters' alter ego". It is clear that the legislative function itself is immune under the Speech or Debate Clause and it is submitted that the personnel decisions of members of Congress with respect to their personal legislative staffs are immune as legislative functions.

Thus, the Constitutional considerations involving the Fifth Amendment rights of plaintiff Davis are outweighed by the weightier constitutional considerations required by the Speech or Debate Clause which emanates from the cornerstones of our system of government as contemplated by the framers of the Constitution. The existence of the Speech or Debate Clause and its application to this case warrant hesitation in the expansion of a *Bivens* cause of action to alleged Fifth Amendment infringements by members of Congress.

D. No Damages Remedy Should Be Implied From the Fifth Amendment in This Case.

It is contended generally for the reasons stated herein that an expansion of the *Bivens* rationale to imply actions for money damages directly from the Fifth Amendment is an improper and unwarranted extension of that rationale. It is further contended that even if this Court were disposed to favor expansion of the *Bivens* rationale beyond the Fourth Amendment confines of the *Bivens* decision to cover actions based on the Fifth Amendment, such an expansion would be

improper in the case at bar on its narrow facts which involves the internal employment relationship of the legislative staffs of members of Congress. The Fifth Circuit by its decision refused to supervise the internal personnel problems of Congress, if any there be, and it is urged that the en banc decision below be affirmed and that the *Bivens* rationale thereby not be extended to the particular facts of this case for the reasons set forth herein and for the reasons set forth in the en banc decision below.

II.

THE SPEECH OR DEBATE CLAUSE PROVIDES MEMBERS OF CONGRESS WITH ABSOLUTE IMMUNITY FROM JUDICIAL INQUIRY INTO THE HIRING AND FIRING OF PERSONAL STAFF EMPLOYEES.

A. The Speech or Debate Clause Has Preconstitutional Origins in the Political History of England and America.

The Speech or Debate Clause found in Article 1, Section 6 of the Constitution states that "for any speech or debate in either House, (the Senators and Representatives shall not be questioned in any other place." Justice Felix Frankfurter summarized the history of the Speech or Debate Clause as follows:

> "The privileges of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries. As Parliament achieved increasing independence from the its statement of the privilege grew stronger.... In 1689,

the Bill of Rights declared in unequivocal language: 'That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament.' (Citation omitted).

Freedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation. It was deemed so essential for representatives of the people that it was written into the Articles of Confederation and later into the Constitution. Article 5 of the Articles of Confederation is quite close to the English Bill of rights: 'Freedom of Speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress. . . .'" *Tenney v. Brandhove*, 341 U.S. 367, 372; 95 L.Ed. 1019, 1025 (1957).

The Speech or Debate Clause obviously had its origins in the very essence of the political process of both England and America and antedates, historically, both the Fifth Amendment and the concept of sex discrimination as an infringement of the Fifth Amendment. The Clause represents a centuries old constitutional commitment to the freedom of the individual legislators from intervention forays by the executive branch or the judicial branch of government.

B. The Speech or Debate Clause Applies to the Actions of Individuals Against Members of Congress.

The Speech or Debate Clause has been held to immunize Congressmen from persecutory forays by the Executive

Branch using judicial means[21] and has been further held to create immunity from individuals using judicial means to vindicate individual rights.[22] Thus, it is clear that when the Speech or Debate Clause applies, it "... provides protection against civil as well as criminal actions, and against actions brought by private individuals as well as those initiated by the Executive Branch." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, at 503 (1975). Even before the above enunciation of this principle in *Eastland*, the decisions of this Court were recognized to "... indicate that the scope of the clause is effectively coextensive in executive motivated and private action cases."[23] The case before this Court involves an attempt to assert an alleged individual right by Plaintiff Davis, and it is submitted that Davis' conception of an individual right must fall to the important immunity afforded by the Speech or Debate Clause to all Congressmen.

C. The "Sphere of Legislative Activity" is Broad and Encompasses the Personnel Actions of Members of Congress.

In *Tenney v. Brandhove*, 341 U.S. at 376, the Court directed its inquiry as to whether it appeared that the legislators ". . . were acting in the sphere of legitimate legislative activity." This, necessarily, is the same inquiry which must be made in the instant case. The mission of

[21]See for example, *Gravel v. United States*, 408 U.S. 606 (1972).

[22]*Kilbourn v. Thompson*, 103 U.S. 168 (1881); *Tenney v. Brandhove, supra; Dombrowski v. Eastland*, 387 U.S. 82 (1967).

[23]Reinstein & Silvergate, *Legislative Privilege and the Separation of Powers*, 86 Harv. L. Rev. 1113, at 1172 (1973).

members of Congress is legislative and their primary concern is legislation. The act or acts of legislating include participating in committee investigations with issuance of compulsory process, voting on matters before Congress, speechmaking on the floor of Congress, and the circulation of information to other members of Congress, all of which legislative acts have been established as such by decisions of the Supreme Court and were noted by the panel of this Court in the original Panel decision below.[24] What must be understood is that a Congressman gathers his staff around him to assist him in performing his legislative functions; this is his ultimate and primary role, his staff's ultimate and primary role and in fact, is their whole *raison d'etre.* This reality must be properly weighed before supplanting the legislative judgment in personnel matters by legislators. It is the legislators, not the judiciary, who are charged by the Constitution with the responsibility of trying to effectively legislate, with the staff of their choice.

To amplify the pervasiveness of the legislative function, one must consider the fact that the function obviously includes inter alia the persuasion of other members of Congress to gain or disaffect support for bills, the drafting and typing of legislative proposals, the drafting and typing of letters to other Congressmen pertaining to legislative proposals, discussions with one's staff as to the views of one's constituents on pending legislation, the preparation and typing of memoranda by staff members for a Congressman's aid in considering legislation, conferences with lobbyists or special interest groups related to legislative proposals or policies, discussion among aides of different Congressmen as to legislative proposals or policies, staff

[24]Appendix 32.

scheduling of Congressmen's meetings with other Congressmen for legislative discussions, and many other doubtless daily activities in which the legislative functions of a Congressman and his staff meld and in which all participate in some facet or at some level of the legislative function depending on an individual's particular work assignment or title. The foregoing recitation of obviously typical functions of a legislator's office serves to demonstrate to the Court that the "sphere of legitimate legislative activity" cannot be narrowly compartmentalized. If the delivery of a speech on the floor of Congress is a legitimate legislative function,[25] then the Congressman or aide's preparation of the speech, including dictation to a secretary and typing, and the discussions with his staff about the form or substance of the speech are also legitimate legislative functions. Such staff functions and relationships are clearly "an integral part of

[25]See *United States v. Johnson*, 383 U.S. 169 (1966). This case is further enlightening because it demonstrates the clearly legislative nature of the work of administrative assistants. *Ibid*, at 174. There, all of the Congressman's speechwriting was performed by his administrative assistant who additionally met with special interest groups. This is the position for which Mrs. Davis was "understudy," *Davis v. Passman*, 544 F.2d, at 868, and is clearly a legislative role which required training in the legislative process to adequately fill. Indeed, Mrs. Davis, in the complaint (Appendix 4), asserts that she was well-qualified for the position of administrative assistant and even has urged the expectancy of promotion to that position as a matter requiring relief especially inasmuch as a salary increase of the difference between her already substantial pay of $18,000 per annum and the $32,000 per annum was involved. Mrs. Davis who began this case as a deputy administrative assistant or understudy to Passman's administrative assistant, became merely the "office supervisor" later in the proceeding (Petitioner's Supplemental Brief on Rehearing En Banc pp. 27, 31) and at present is occupying the position of "secretary" or "office worker". (Petitioner's Brief to this Court, 53, 56).

the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel,* 408 U.S. at 625.

D. As Employees of Members of Congress Share the Speech or Debate Immunity of the Members, Their Employment Relationship Should Be Immune From Judicial Scrutiny.

Indeed, the legislative function is so broad and the staff of a Congressman is so important to that function that this Court has even extended the Speech or Debate immunity to staff employees of members of Congress. *Eastland v. United States Servicemen's Fund, supra,* at 507. *Gravel, supra,* at 621; and *Doe v. McMillan,* 412 U.S. 306, at 317 (1973).

In *Gravel,* it was flatly asserted that aides were to be treated as alter egos of their Congressmen, recognizing that:

> "... it is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for members of Congress to perform their legislative tasks without the help of aides or assistants; that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latters' alter ego; and that if they are not so recognized, the central role of the Speech or Debate Clause—to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary, United States v. Johnson, 383 U.S. 169, 181, 15 L.Ed.2d 681, 86 S. Ct. 749 (1966)—will inevitably be diminished and frustrated." *Gravel, supra,* at 617.

In *Gravel* it was held that Senator Gravel's aide's immunity extended to legislative acts as to which Senator Gravel himself was immune. In *Doe v. McMillan, supra,* the Supreme Court found that the Speech or Debate Clause immunity extended to the Congressional Committee's clerk, the staff director, the counsel, a consultant and an investigator for the Committee. In *Eastland v. United States Servicemen's Fund, supra,* a Senate Subcommittee's chief counsel shared the Senator's immunity.

What Appellee wishes to emphasize at this point is that because the legislative function is so broad and because the crucial importance of a Congressman's staff to the legislator's functions has been so recognized by the United States Supreme Court, a Congressman must be free to choose those members of his staff whose ". . . day-to-day work. . . is so critical to the Members' [legislative] performance. . ." *Gravel, supra,* at 617. In other words, if a Congressman and his aide are both cloaked by legislative immunity, why should not their relationship be immune from executive or judicial interference. It seems incongruous that a Congressman cannot choose who is to be his own alter ego without being questioned ". . . in any other Place. . ." about the discharge. It is submitted that the hire or discharge of a legislative staff member is itself "clearly a part of the legislative process - the due functioning of the process"[26] for which a member of Congress may not be questioned outside of the Halls of Congress. The legislative function is so important to the workings of democratic government that it

[26] *United States v. Brewster,* 408 U.S. 501, 516, 33 L.Ed.2d 507, 92 S. Ct. 2531 (1972). The crucial relationship and functions of the staff of members of Congress are clearly more intimately involved in the legislative activities of the members than were the "political" activities mentioned in *Brewster,* Id. at 512.

could even be said the nation suffers if a legislative aide cannot perform his or her assigned tasks in the manner or with the quality expected or required by the member of Congress. It is not merely another employment situation where private rights are the sole consideration.

Further, if the Speech or Debate immunity is held not to apply to Congressional personnel situations involving legislators' employees, the judicial gate will be opened to require judicial scrutiny of the legislative branch of government insofar as individuals alleged discriminatory gender-related refusals to hire, failures to promote, demotions, imposition of more onerous working conditions, refusals to assign more desirable tasks, disciplinary measures, and other similar typical personnel actions which could affect legislative staff members. The legislative functions and responsibilities are important enough and delicate enough that members of Congress should be permitted to assign a male aide to a given task for whatever reason is believed to be proper without fear of judicial intervention on behalf of an offended female aide. Conversely, a member of Congress should be permitted to assign a female aide to handle a matter for whatever reason the Congressman believes to be proper without fear of judicial questioning of the work assignment on behalf of an irate male staff member. A Congressman must be permitted to frankly pick and choose among those who will stand in his place, in his shoes, as his alter ego in Congress in order that the legislative function may be performed as he believes to be proper. Even though in a different context, the Court's statement in *Eastland v. United States Servicemen's Fund, supra,* at 508, rings true when it highlighted the principle that "... in determining the legitimacy of a congressional act we do not look to the motives alleged to have prompted it."

Congressman Passman's motives in discharging legislative staff member Davis are, therefore, of no legal significance if the act of discharge of a personal staff member is a legislative act and further, do not destroy the constitutionally imposed Speech or Debate immunity. Moreover, "The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." *Tenney v. Brandhove, supra,* at 376.

Further, as the Court stated in *Eastland v. United States Servicemen's Fund:*

> "In reading the Clause broadly we have said that legislators acting within the sphere of legitimate legislative activity 'should be protected not only from the consequences of litigation's results but also from the burden of defending themselves.' Dombrowski v. Eastland, supra, at 85, 18 L.Ed.2d 577, 87 S. Ct. 1425. Just as a criminal prosecution infringes upon the independence which the Clause is designed to preserve, a private civil action, whether for an injunction or damages, creates a distraction and forces Members to divert their time, energy and attention from their legislative tasks to defend the litigation. Private civil actions also may be used to delay and disrupt the legislative function. Moreover, whether a criminal action is instituted by the Executive Branch, or a civil action is brought by private parties, judicial power is still brought to bear on Members of Congress and legislative independence is imperiled. We reaffirm that once it is determined that members are acting within the 'legitimate legislative sphere' the Speech or Debate Clause is an absolute bar to interference. Doe v. McMillan, 412 U.S., at 314, 36 L.Ed.2d 912, 93 S. Ct. 2018." *Eastland, supra,* at 503.

Based upon the foregoing, Defendant respectfully submits to the Court that the "sphere of legitimate legislative activity" fully encompasses the hiring and firing of legislative staff members and that, accordingly, Congressman Passman's actions herein are fully immune under the Speech or Debate Clause of the Constitution.

CONCLUSION

Based upon the reasons set forth above, and the reasons expressed in the en banc opinion below, it is respectfully urged that the judgment below be affirmed.

Respectfully submitted,

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